

1 **UNITED STATES DISTRICT COURT**2 **DISTRICT OF NEVADA**

3 JUSTIN SHAUL,

Case No.: 3:22-cv-00052-RCJ-CSD

4 Plaintiff

Order

5 v.

Re: ECF Nos. 1, 1-1

6 ELKO COUNTY SHERIFF'S OFFICE et al.,

7 Defendants

8
9 This Report and Recommendation is made to the Honorable Robert C. Jones, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
11 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff, who is currently incarcerated within the Pendleton Correctional Facility in
13 Indiana, has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se
14 complaint (ECF No. 1-1).

15 **I. IFP APPLICATION**

16 A person may be granted permission to proceed IFP if the person “submits an affidavit
17 that includes a statement of all assets such [person] possesses [and] that the person is unable to
18 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
19 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

20 The Local Rules of Practice for the District of Nevada provide: “Any person who is
21 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
22 The application must be made on the form provided by the court and must include a financial
23 affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the
7 institution and the net deposits in the applicant’s account for the six months prior to the date of
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
9 at the institution for less than six months, “the certificate must show the account’s activity for
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
14 deposits or the average monthly balance for the six-month period immediately preceding the
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the
21 last six months was \$50, and his average monthly deposits were \$50.

22 Plaintiff’s application to proceed IFP should be granted. Plaintiff should be required to
23 pay an initial partial filing fee in the amount of \$10 (20 percent of \$50). Thereafter, whenever his

1 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
 2 preceding month's income credited to his account until the \$350 filing fee is paid.

3 **II. SCREENING**

4 **A. Standard**

5 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 6 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 7 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 8 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 9 § 1915(e)(2)(A), (B)(i)-(iii).

10 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 11 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 12 which a prisoner seeks redress from a governmental entity or officer or employee of a
 13 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 14 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
 15 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 16 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 18 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 19 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 20 complaint under these statutes, the court applies the same standard as is applied under Rule
 21 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
 22 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 23 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff sues the Elko County Sheriff's Office, Sheriff Aitor Narcazia, Officer Brian
19 Shoaf, and Sergeant Doug Fisher. Plaintiff alleges that he was pulled over on March 8, 2017,
20 while traveling to Las Vegas, Nevada, and Officer Shoaf detained him and he was brought and
21 held at the Elko County Jail. Officer Shoaf seized a suitcase containing \$44,646. Then, Sergeant
22 Fisher arrived, and did an inventory check of the property in the car and the property was
23 photographed and brought to the evidence room at the Elko County Sheriff's Office. Sheriff

1 Narcazia was made aware of the situation. Plaintiff was then extradited to Anderson, Indiana,
2 and was informed by his counsel that all of the property had been lost or stolen.

3 The Fourteenth Amendment prohibits any state from depriving “any person of life,
4 liberty, or property, without due process of law.” *See* U.S. Const., amend. XIV.

5 To the extent Plaintiff alleges his money was lost or stolen in connection with his arrest,
6 this constitutes an unauthorized negligent or intentional action, and Plaintiff cannot state a claim
7 where the state provides an adequate post-deprivation remedy. *See Zinermon v. Burch*, 494 U.S.
8 113, 129-132 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Plaintiff may seek damages
9 in a state court tort lawsuit; therefore, he has failed to state a due process claim for the alleged
10 lost or stolen property. Plaintiff’s federal due process claim should be dismissed with prejudice.

11 III. RECOMMENDATION

12 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

13 (1) **GRANTING** Plaintiff’s IFP application (ECF No. 1); however, within **30 DAYS**

14 Plaintiff must pay, through his institution, an initial partial filing fee in the amount of \$10.

15 Thereafter, whenever his prison account exceeds \$10, he is required to make monthly payments
16 in the amount of 20 percent of the preceding month’s income credited to his account until the full
17 \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise
18 unsuccessful. The Clerk must **SEND** a copy of this Order to the attention of **Chief of Inmate**
19 **Services for the Indiana Department of Corrections**, 4490 W Reformatory Rd, Pendleton, IN
20 46064.

21 (2) The Clerk should be directed to **FILE** the complaint (ECF No. 1-1).

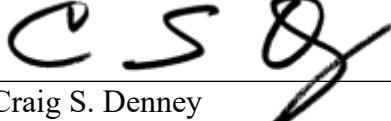
22 (3) The complaint should be **DISMISSED WITH PREJUDICE**.

1 Plaintiff should be aware of the following:

2 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of being served with a copy of the Report
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
5 Report and Recommendation” and should be accompanied by points and authorities for
6 consideration by the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
9 until entry of judgment by the district court.

10
11
12 Dated: February 28, 2022

13 
14 Craig S. Denney
United States Magistrate Judge